UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

MICHAEL FEIST,
Charging Party,

and

Case Nos.
25-CA-130127
25-CB-130081

INDUSTRIAL CONTRACTORS SKANSKA, INC.,
Employer,

and

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 561,
Union.

CHARGING PARTY'S REPLY BRIEF TO LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 561'S ANSWERING BRIEF

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I. INTRODUCTION

On March 24, 2015, Charging Party Michael Feist ("Feist") filed Exceptions and a Brief in Support of Exceptions ("Exceptions Brief"). On April 21, 2015, Laborers International Union of North America, Local 561 ("Union") filed an Answering Brief to Feist's Exceptions ("Answering Brief"). Feist hereby submits this Reply Brief to the Union's Answering Brief. For the reasons stated herein, the National Labor Relations Board ("Board") should reject the arguments presented in the Union's Answering Brief.

II. RESPONSE IN OPPOSITION TO THE UNION'S ANSWERING BRIEF

A. The Union's "Introduction"

The Union opens its brief by claiming, without explanation, that Feist failed to meet the requirements of Section 102.46(b) of the Board's Rules and Regulations Manual. However, Feist met these requirements in both his Exceptions and Exceptions Brief in Support.

B. Response to the Union's claim that "The principal case relied upon which the Charging Party relies, *Philadelphia Sheraton*, is inapplicable in this case because the Charging Party, Michael Feist, was aware of his dues obligations at all times."

The Union correctly acknowledges that, pursuant to the holding in *NLRB v. Hotel, Motel & Club Employees' Union, Local 568 (Philadelphia Sheraton Corp.),* 320 F.2d 254 (3d Cir. 1963), *enforcing* 136 NLRB 888 (1962), "a member must be given specific notice of his dues arrearage and an opportunity to rectify the arrearage"[1] prior to his discharge being sought. It is without dispute that the Union failed to do this prior to sending its April 8, 2014 faxed discharge demand to the Employer. (TR 31). The Union incorrectly claims that Feist's alleged "actual knowledge" of the amounts in question and his alleged "unclean hands" relieved the Union of its legal obligation to provide him with a *Philadelphia Sheraton* notice prior to it seeking his

[1] Answering Brief, p. 4.

discharge. The Union further contends that it did not provide Feist with a *Philadelphia Sheraton* notice because it did not have his address.

C. "Actual Knowledge"

The Union claims that it was relieved it of its obligation to provide Feist with a *Philadelphia Sheraton* notice because of his alleged "actual knowledge" of the dues owed. Feist discussed this issue at length in his Exceptions Brief. Despite the Union's claim to the contrary, it is evident that the exception to the rule requiring a union to provide a bargaining unit member with a *Philadelphia Sheraton* notice discussed in *Food & Commercial Workers Local 368A (Professional Services)*, 317 NLRB 352 (1995) is inapplicable to Feist. This is because Feist does not meet *either* of the two requirements necessary to fall within the *Professional Services* criteria.

First, Feist did not "knowingly and not through inadvertence or ignorance evade his dues obligation to the Union."[2] In fact, Feist did not evade his dues obligation at all. The record and the testimony of both Feist and Union employee Diane McCormick make this obvious. The uncontested trial testimony of both parties proves that Feist went to the Union hall on April 8 to *make* a dues payment, not to *evade* making a payment. McCormick testified that, on the day the dues dispute took place, Feist "offered to pay his monthly dues that day." (TR 178-79). He also returned to the Union hall that same day in order to rectify the dues dispute after being told he had been suspended. (TR 107). These are not the actions of a bargaining unit member "evading" his dues obligation. In fact, Feist made a significant effort to *comply* with his dues obligation on April 8. Additionally, Feist was told by Union President Barry Russell that he would receive a call from Secretary-Treasurer Harlin Scott to clear up the confusion. Despite this assurance, Scott never called Feist. (TR 143).

[2] Answering Brief, p. 5.

Second, the *Professional Services* exception does not apply because Feist in no way "benefit[ed] from his non-compliance with [his dues] obligation."[3] The Union does not explain how Feist garnered any benefit by allegedly failing to comply with his dues obligation. If anything, Feist's alleged "failure" has been nothing but *detrimental* to him, as it has resulted in him losing his job with the Employer and, thus, his livelihood. Therefore, neither prong in the *Professional Services* test applies to Feist. The default rule discussed in *National Independent Coopers Union (Blue Grass Cooperage Co.),* 299 NLRB 720 (1990) applies here. The rule clearly states:

> While the record shows that [Charging Party] was aware of a dues obligation under the union-security provisions of the contract, *this knowledge does not relieve the Union of its fiduciary duty to advise [Charging Party], with the requisite specificity, what he must do to retain membership so as to avoid discharge* (emphasis added).[4]

As demonstrated, actual knowledge is *irrelevant* to the Union's obligation to provide Feist with a *Philadelphia Sheraton* notice. As the Union failed to provide Feist with such a notice, it violated Section 8(b)(1)(A) of the Act.

The full extent of Feist's alleged "actual knowledge" was the Union's *claim* of what he owed. However, Feist was unable to verify the accuracy of this claim because the Union did not provide him, pursuant to *Philadelphia Sheraton*, with (1) the precise amount of dues he allegedly owed in arrears, including the months for which the dues were allegedly owed and the method of said calculation; (2) a deadline by which the required payment had to be made; (3) notice that failure to pay would result in denial of employment, or (4) a reasonable amount of time to pay those amounts prior to seeking his discharge from employment.[5] Feist's situation is a perfect example *why Philadelphia Sheraton* requires the giving of a notice. It is required in order to

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[3] *Id.*

[4] *Id.* at 723. (emphasis added).

[5] S*ee Coopers National Independent Union (Blue Grass Cooperage Co.*).

prevent precisely the type of confusion present here, where one party does not believe he owes anything and the other party believes that he does owe something. The Union, rather than hastily sending a fax within mere hours of Feist learning of the dues dispute, which violates *Philadelphia Sheraton's* "reasonable amount of time to pay those amounts prior to seeking his discharge from employment" requirement, should have provided Feist with a notice. In fact, hand-delivery of such a notice was already required by the explicit terms of the compulsory unionism clause in the CBA. Despite the fact that Feist was present at the Union hall on two separate occasions on the day he learned of the dues dispute (TR 110), the Union failed to provide him with the relevant information and instead sent its faxed discharge demand to the Employer only a few hours later.

D. "Unclean Hands"

The Union next claims that it was relieved of its obligation to provide Feist with a *Philadelphia Sheraton* notice because Feist had "unclean hands."[6] The Union discusses Feist's four previous dues delinquencies dating back to 1997, and concedes that Feist "ultimately paid his dues and was reinstated."[7] The simple fact that Feist may have first disagreed with the Union regarding the dues amounts in question, but then ultimately paid them does not give him "unclean hands," and the Union provides no Board precedent or case law to support the contention that it does. In addition, there is no dispute that Feist regularly paid his working dues. That fact further weakens any Union claim that he had "unclean hands" with regard to dues payments. The following exchange between the Board attorney and Union President Barry Russell took place at trial:

Q. There is no dispute that his working dues were being paid, correct, that you're aware of?

[6] Answering Brief, p. 2.
[7] *Id.* at 6.

A. I wasn't aware that he wasn't, you know. I don't know how much he's been working. *But, yeah, I would say he was.* (TR 27) (emphasis added).[8]

The Union further claims that Feist had "unclean hands" because he provided a dues receipt bearing the name of another member, Brian Simpson, to the Union as proof of Feist's payment.[9] The Union would have the Board believe that Feist's actions were deceitful, when in fact they resulted from a simple oversight. The notion that Feist would leave the Union hall and drive home to collect a dues payment receipt with someone *else's* name on it to give to the Union as proof he had paid *his* dues is nonsensical. It is far likelier that the Union mistakenly gave Feist Brian Simpson's receipt, which at the time Feist did not verify as his own. Feist then presented it to the Union on April 8 as proof of payment, mistakenly thinking it was his receipt. He testified that he thought there must have been a "mix-up… at the pay window at the hall" (TR 109) that caused this problem. When asked about this mix-up upon his presenting the receipt to McCormick on April 8, Feist replied:

[McCormick] looked at it and said, well, this isn't even your receipt. I said what do you mean? She said this belongs to Brian Simpson. And, actually, it did, so I didn't, you know, I didn't dispute it. It wasn't mine. But I don't know how I got the receipt, other than getting it from paying dues in March. That's the only way I could have gotten it. (TR 108).

That Feist received Simpson's receipt by mistake is further bolstered by McCormick's testimony under cross-examination by Feist's attorney:

Q. In 20 years of working there, you must have issued a lot of receipts over time, right?
A. Yes, sir.
Q. Thousands?
A. Yes.
Q. Ever make a mistake?
A. Yes.
Q. Are sometimes some of the union members confused about how much dues they owe?
A. Yes.
(TR 185).

[8] "TR" refers to the transcript of the hearing held on January 6, 2015.
[9] Answering Brief, p. 7.

The evidence and the testimony of both Feist and McCormick demonstrate that Feist, in providing the Union with Brian Simpson's receipt, made an innocent mistake. It is hard to take seriously the contention that a member who regularly paid his working dues to the Union has "unclean hands" as the result of such a solitary mistake. In addition, it is likely that the *first thing* McCormick would verify upon receiving the receipt was that it actually belonged to Feist, which renders any explanation that Feist was trying to deceive the Union highly doubtful. The facts and testimony support the proposition that the receipt was acquired due to a mistake made by Diane McCormick and was presented to the Union due to a mistake made by Feist.

E. "Address Defense"

The Union's "address defense" is discussed at length in the Exceptions Brief. Assuming, *arguendo,* the Union did not have Feist's address on file, it made no effort to obtain that information despite its availability and despite the holding in *Oklahoma Fixture Co.*, 308 NLRB 335 (1992), which required the Union to do so. In *Oklahoma Fixture*, a union mailed important employee information to the wrong address without giving a credible explanation or justification for the mistake. The Board wrote that the union:

> …in attempting to cause and causing the discharge of [Charging Party] for being delinquent in the payment of his union dues, failed to fulfill its fiduciary obligation by giving [him] adequate and reasonable notice of his dues delinquency…*The Union could easily have obtained [his] correct address from the Employer's records* or even from the local telephone directory.[10]

The situation here parallels that in *Oklahoma Fixture*: the Union could have called the Employer, for whom Feist has worked almost exclusively for several years, (TR 99), to ask for his address. The Union also could have looked up the address in the phone book, undertaken an internet search, or contacted the International Union in an effort to obtain it. In short, the Union had numerous sources easily within its reach from which to obtain Feist's address. Evidently,

[10] *Id.* at 338. (emphasis added).

though, the Union made no effort to seek out the address despite the holding in *Oklahoma Fixture*. Instead, it sent the discharge demand to the Employer within only a few *hours* of Feist first learning of the dues dispute.

In any event, the Union's "address" defense does not hold water. The Union did not need Feist's address to meet its legal obligations owed him. The Union's compulsory unionism clause in the CBA requires hand-delivery of a notice to the affected bargaining unit member and to his job superintendent. (G.C. Ex. 2).[11] The undisputed trial testimony of Union President Barry Russell proves that the Union violated its CBA when it failed to provide the notice to either party prior to seeking Feist's discharge. (TR 31). This is true even though Feist went to the Union hall *twice* on the very day the Union sent its faxed demand to the Employer. (TR 110). The Union gives no explanation as to why it failed, at the very least, to make the required hand-delivery to the job superintendent, for whom it obviously needed no address. The Union's "address" defense is a red herring, the sole purpose of which is to distract attention from the incontrovertible fact that it violated its own compulsory unionism clause, and consequently its duty of fair representation, in seeking Feist's discharge.

III. CONCLUSION

Based on the foregoing, Feist requests that the Board reject the arguments in the Union's Answering Brief and uphold Feist's Exceptions to the ALJ's decision.

Respectfully submitted,

/s/ Byron Andrus

Attorney for Charging Party

[11] "G.C. Ex." refers to the General Counsel's exhibits.

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of May, 2015, I filed via E-filing the foregoing **CHARGING PARTY'S REPLY BRIEF TO LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 561'S ANSWERING BRIEF** with the National Labor Relations Board. I also certify I have served said brief via e-mail to the following parties to this action:

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